



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

February 5, 2003

Ms. Julie Reagan Watson
Assistant General Counsel
Texas Department of Human Services
P.O. Box 149030
Austin, Texas 78714-9030

OR2003-0749

Dear Ms. Watson:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 176063.

The Texas Department of Human Services (the "department") received a request for information relating to Care Temps, L.L.C. and Visiting Angels Living Assistance Services. You inform us that information consisting of reports, records, and working papers used or developed in an investigation under section 142.009 of the Health and Safety Code will be withheld in accordance with the previous determination issued to the department in Open Records Letter No. 2001-5348 (2001). *See* Gov't Code § 552.301(a); Open Records Decision No. 673 at 6-9 (2001) (delineating instances in which attorney general decision constitutes previous determination under Gov't Code § 552.301). You state that the department will release other responsive information. You claim that the remaining requested information is excepted from disclosure under sections 552.101 and 552.137 of the Government Code. We have considered the exceptions you claim and have reviewed the information you submitted.

Initially, we must determine whether the department complied with section 552.301 of the Government Code in requesting this decision. Section 552.301 prescribes procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Section 552.301(b) requires the governmental body to request an attorney general decision and state the exceptions to disclosure that apply not later than the tenth business day after the date of its receipt of the written request for information. Section 552.302 provides that if the governmental body does not request an attorney general decision as provided by section 552.301, the requested information is presumed to be subject to required public disclosure and must be released unless there is a compelling reason to withhold the information from the public. *See also Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.--Austin 1990, no writ).

You state that the department received this request for information on October 19, 2002. On October 22, 2002, the department asked the requestor for additional information regarding the request. The requestor responded on November 4, 2002. The department requested this decision by letter dated November 20, 2002. Section 552.222 of the Government Code permits a governmental body to ask a requestor to clarify or narrow a request for information if the information being requested is unclear to the governmental body or if a large amount of information has been requested. *See Gov't Code § 552.222(b)*. However, a governmental body's communications with a requestor for the purpose of clarifying or narrowing a request for information merely toll the governmental body's deadline under section 552.301(b) to request a decision. *See Open Records Decision No. 663 at 2-5 (1999)*. In this instance, the department did not request this decision within the ten business days prescribed by section 552.301(b). Consequently, the information at issue is presumed to be public and must be released under section 552.302 unless there is a compelling reason to withhold the information. The presumption that information is public under section 552.302 can generally be overcome by a demonstration that the information is confidential by law or that third-party interests are at stake. *See Open Records Decision Nos. 630 at 3 (1994), 325 at 2 (1982)*. Sections 552.101 and 552.137, which the department raises, can provide compelling reasons for non-disclosure under section 552.302. Accordingly, we will address your arguments.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This exception encompasses information that other statutes make confidential. You claim that some of the submitted information is confidential under 142.009(d)(5) of the Health and Safety Code. This section provides that "reports, records, and working papers used or developed in an investigation made under this section are confidential and may not be released or made public except . . . (5) on a form developed by the department that identifies any deficiencies found without identifying a person, other than the home and community support services agency[.]" Health & Safety Code § 142.009(d)(5). You acknowledge that the department is required to release the state forms submitted as Attachment B under section 142.009(d)(5). You claim, however, that this section requires the department to withhold the identifying information contained in the state forms. You have marked that information. We agree that you must withhold the marked portions of the state forms under section 552.101 of the Government Code in conjunction with section 142.009(d)(5) of the Health and Safety Code.

You also contend that the state forms contain information that is subject to the Medical Practice Act (the "MPA"), as codified at subtitle B of title 3 of the Occupations Code. *See Occ. Code § 151.001*. The MPA governs the disclosure of medical records. Section 159.002 of the MPA provides in part:

- (a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Id. § 159.002(a)-(c). This office has determined that in governing access to a specific subset of information, the MPA prevails over the more general provisions of chapter 552 of the Government Code. *See* Open Records Decision No. 598 (1991). Medical records must be released upon the patient's signed, written consent, provided that the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. *See* Occ. Code §§ 159.004, .005. Section 159.002(c) requires that any subsequent release of medical records be consistent with the purposes for which the governmental body obtained the records. *See* Open Records Decision No. 565 at 7 (1990). Medical records may be released only as provided under the MPA. *See* Open Records Decision No. 598 (1991). You have marked the information contained in the state forms that you contend is governed by the MPA. We agree that the department must not release that information unless the MPA permits the department to do so.

You assert that other responsive information is confidential under section 142.004 of the Health and Safety Code. This section provides in part that "[i]nformation received by the department relating to the competence and financial resources of the applicant or a controlling person with respect to the applicant is confidential and may not be disclosed to the public." Health & Safety Code § 142.004(d). You explain that some of the information submitted as Attachment C was provided to the department during the licensing process. You inform us that the department obtained this information under section 142.004. You state that a portion of this information, which you have marked, relates to the competence of the applicant or a controlling person with respect to the applicant. You have marked other information that relates to the financial resources of the applicant. Based on your representations and our review of the marked portions of Attachment C, we agree that the department must withhold this information under section 552.101 of the Government Code in conjunction with section 142.004 of the Health and Safety Code.

You also note that the documents in Attachment C contain social security numbers. A social security number may be excepted from disclosure under section 552.101 in conjunction with 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), if a governmental body obtained or maintains the social security number pursuant to any provision of law enacted on or after October 1, 1990. *See* Open Records Decision No. 622 at 2-4 (1994). It is not apparent to this office that any social security number contained in Attachment C is confidential under section 405(c)(2)(C)(viii)(I) of the federal law. You have

cited no law, and we are aware of no law, enacted on or after October 1, 1990 that authorizes the department to obtain or maintain a social security number. Thus, we have no basis for concluding that any social security number in Attachment C was obtained or is maintained pursuant to such a law and is therefore confidential under the federal law. We caution you, however, that chapter 552 of the Government Code imposes criminal penalties for the release of confidential information. *See* Gov't Code §§ 552.007, .352. Therefore, before releasing a social security number, the department should ensure that it was not obtained and is not maintained pursuant to any provision of law enacted on or after October 1, 1990.

Lastly, we address your claim under section 552.137 of the Government Code. This exception provides as follows:

- (a) An e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.
- (b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

Gov't Code § 552.137. You contend that section 552.137 is applicable to an e-mail address that you have marked in Attachment C. We note, however, that the marked e-mail address is that of a business entity, rather than a member of the public. We therefore conclude that this e-mail address is not excepted from disclosure under section 552.137.

In summary, the department must withhold some of the submitted information under section 552.101 of the Government Code in conjunction with sections 142.009 and 142.004 of the Health and Safety Code. The department must not release the information that is subject to the MPA unless the MPA permits the department to do so. The department may be required to withhold a social security number under section 552.101 in conjunction with section 405(c)(2)(C)(viii)(I) of title 42 of the United States Code. The department must release the rest of the submitted information.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days.

Id. § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

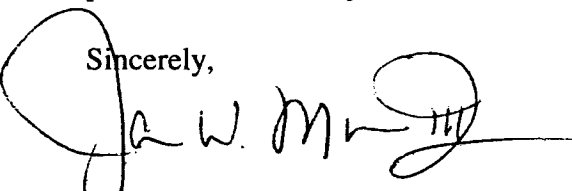
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/sdk

Ref: ID# 176063

Enc: Submitted documents

c: Mr. M.L. Welsh
3939 Salvador
Pasadena, Texas 77504
(w/o enclosures)